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In the Supreme Court of the United States

OCTOBER TERM, 1959

ROBERT H. CAIN, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1960. The petition for a writ of certiorari was filed on March 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 12541(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1461 renders non-mailable a "filthy and vile" private letter.

2. Whether 18 U.S.C. 1461 violates the guarantees of the First and Fifth Amendments.

STATEMENT

On February 20, 1959, a 4-count indictment was returned in the United States District Court for the Western District of Louisiana charging, in counts 1 and 3, that the petitioner mailed two "indecent, filthy and vile" letters in violation of 18 U.S.C. 1461 to Beverly Robertson, and in counts 2 and 4 that these letters contained threats to injure her person in violation of 18 U.S.C. 876 (R. 1-3). Following a jury trial, the petitioner was convicted on counts 1 and 3, and acquitted on counts 2 and 4 (R. 99-100). He was sentenced to imprisonment for one year on each of counts 1 and 3, to run concurrently. Execution of the prison sentence was suspended and the petitioner was placed on probation for 5 years (R. 107).

The facts are not in dispute: The petitioner testified that he had written and mailed the letters[1] to Beverly Robertson, explaining that they were written in anger (R. 64-65, 67). Postal inspector Harmon D. Newton stated that he had discussed these letters with the petitioner, who voluntarily admitted writing and mailing them (R. 49-52). The petitioner also executed a sworn statement to that effect (R. 53). The addressee testified that she had received them (R. 30-32).

The court of appeals unanimously affirmed the petitioner's conviction (Pet. App. A).

ARGUMENT

1. The petitioner argues that since the letters he mailed were not "obscene" within the meaning given that term in *Roth* v. *United States*, 354 U.S. 476, 487—that is, not "material which deals with sex in a manner

[1] The letters are set forth in the record at R. 34-37.

appealing to prurient interest"—they were not unmailable under 18 U.S.C. 1461.

The complete refutation of this assertion is provided by this Court's decision almost 30 years ago in *United States* v. *Limehouse*, 285 U.S. 424. In that case, the defendant was charged under the predecessor of the present statute with mailing some thirty "filthy" private letters. On the ground that none were "obscene, lewd or lascivious," the district court dismissed the indictment. In reversing, this Court, through Mr. Justice Brandeis, stated (p. 426):

> The indictment here under review contains no reference to "obscene, lewd, or lascivious." The charge is of depositing "a certain filthy letter." It is brought under the amendment to § 3893 of the Revised Statutes made by § 211 of the Criminal Code, Act of March 4, 1909, * * * which inserted the words "and every filthy." Now the clause reads "every obscene, lewd, or lascivious, and every filthy, book, * * * letter."[2]
>
> The lower court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it * * * gave to "filthy" the meaning attributed * * * to the words "obscene, lewd, or lascivious." Thus, the court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment Congress added a new class of unmailable matter,—the filthy. * * *

[2] 18 U.S.C. 1461 presently covers "obscene, lewd, lascivious, indecent, filthy or vile" material.

Cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572.[3]

2. Petitioner's further contention that 18 U.S.C. 1461 violates the First and Fifth Amendments (Pet. 5-7), was recently resolved in favor of constitutionality in the *Roth* case, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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[3] The petitioner's reliance (Pet. 4-5) upon *United States* v. *Keller*, 259 F. 2d 54 (C.A. 3) is misplaced since that case involved an indictment under 18 U.S.C. 1463 which does not cover "filthy or vile" material but by express terms deals only with "indecent, lewd, lascivious, or obscene" matter.

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